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IN THE

SUPREME COURT OF THE UNITED STATES

No. 16104

WILLIAM BIRDWELL, ET AL, *Appellants,*

vs.

J. M. KIRKLAND, ET AL, *Appellees.*

WILLIAM BIRDWELL, ET AL, *Appellants,*

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, ET AL, *Appellees.*

Appealed from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

APPELLEES' BRIEF

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INDEX

	Page
Statement	1–2
Want of Jurisdiction	2–4
The State Court Decision Is Correct	4–5
Conclusion	6
Signature of Counsel	6
Certificate of Service	7
Appendix	8–24

AUTHORITIES

Cases. *Pa*

American Bonding Company of Baltimore vs. Logan (Civ. App. 1910) 132 S.W. 2d 894 .....

American Indemnity Company vs. Noble, (Com. App. 1921) 235 S.W. 867 16,

American Indemnity Company vs. Padgett, (Civ. App. 1940) 136 S.W. 2d 254 .....

Birdwell vs. American Bonding Company, 337 S.W. 2d 120 .....

Hebert vs. State of Louisiana, La., 47 S. Ct. 103, 272 U. S. 312, 71 L. Ed. 270, 48 A.L.R. 1102 .....

Jarnagin vs. Garrett (Civ. App. 1954) 69 S.W. 2d 511, err. ref. .....

Miller vs. Miller (Civ. App. 1895) 53 S.W. 2d 362, err. ref. .....

Moore vs. Hanscom (Sup. Ct. 1908) 106 S.W. 876 .....

Moorehead vs. People of State of New York ex rel. Tipaldo, N.Y., 56 S. Ct. 918, 298 U. S. 587, 30 L. Ed. 1347, 103 A.L.R. 1445, rehearing denied 57 S. Ct. 4, 299 U. S. 619, 81 L. Ed. 456 .....

Morse vs. Morse (Civ. App. 1942) 162 S.W. 2d 1023, err. ref. .....

Neblett vs. Carpenter, Cal., 59 S. Ct. 170, 305 U. S. 297, 83 L. Ed. 182, rehearing denied 59 S. Ct. 355, 305 U. S. 675, 83 L. Ed. 437 .....

Parmley vs. Parmley (Civ. App. 1941) 149 S.W. 2d 647, err. ref. .....

Timmins vs. Bonner and Long (Sup. Ct. 1885) 58 Tex. 554 .....

AUTHORITIES—Continued

Other Authorities

	Page
Article 1853, Texas Revised Civil Statutes of 1895	3
Article 1950, Vernon's Civil Statutes of Texas	20
Article 4201, Vernon's Civil Statutes of Texas	15
Article 4291, Vernon's Civil Statutes of Texas	3
Article 5528, Vernon's Civil Statutes of Texas	3, 4, 11
Article 5529, Vernon's Civil Statutes of Texas	4, 10, 11, 8, 13
21 Tex. Jur. 332, Guardian and Ward, Sec. 558	20
21 Tex. Jur. 351, Guardian and Ward, Sec. 374	16
21 Tex. Jur. 352, Guardian and Ward, Sec. 375	19
21 Tex. Jur. 357, Guardian and Ward, Sec. 378	20
21 Tex. Jur. 358, Guardian and Ward, Sec. 379	21
25 Tex. Jur. 585, Judgments, Sec. 185	11
Rule 166-A, Texas Rules of Civil Procedure	4
Section 1257(2), Title 28, United States Code	2

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APPELLEES' BRIEF

This is a frivolous appeal. The facts out of which these cases arose are summarized at length in the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, reported in 337 S.W. 2d 120 (1960). Briefly stated, Appellants contend that in 1913 their father, G. W. Birdwell, as guardian, sold real estate belonging to their estate, for which he was to receive a down payment of $400.00 cash, but for which he instead accepted two horses, a mare named Ann and a stallion, and that their father never accounted to them for the money which he re-

ceived, or should have received, for the sale of the land. Appellants' father died in 1951. These cases were filed in 1955, thirty-seven years after Appellant Lee Birdwell Green attained age twenty-one, and thirty-one years after William Birdwell attained age twenty-one. In these suits Appellants seek to recover title to the land sold by their guardian in 1913 and also to recover from the sureties on certain guardian's bonds filed by G. W. Birdwell for alleged defalcations by the guardian.

The sureties, American Bonding Company of Baltimore and American Surety Company of New York, filed motions for summary judgment in the District Court of Young County, Texas, which were sustained. The other Appellees filed special exceptions and pleas in abatement, which were also sustained by the Trial Court. On appeal the Court of Civil Appeals affirmed the judgment of the Trial Court for the bonding companies, but reversed the judgment in favor of the other Appellees, remanding the case to the Trial Court for trial on the merits as to those Appellees.

WANT OF JURISDICTION

The Supreme Court of the United States lacks jurisdiction in this case for want of a federal question of substantial character.

Appellants cite Section 1257(2) of Title 28 of the United States Code as the source of jurisdiction of the Supreme Court of the United States in this case. The state statutes, the validity of which they allege

is involved, are Articles 4291 and 5528 of Vernon's Civil Statutes of Texas (1925), and Article 1853 of the Texas Revised Civil Statutes of 1895.

Nowhere in the record will be found any attack by Appellants upon the constitutionality or validity of any of the state statutes cited above. As a matter of fact, Appellants, rather than attacking the validity of the cited statutes, have actually relied upon them, necessarily recognizing their validity. What Appellants are really complaining about is the failure of the appellate courts of Texas to apply the statutes in the manner urged by Appellants.

The general rule is that misconstruction of a valid state statute by the highest court of the state does not give the Supreme Court of the United Staes jurisdiction. *Nebett vs. Carpenter*, Cal., 59 S. Ct. 170, 305 U.S. 297, 83 L. Ed. 182, rehearing denied 59 S. Ct. 355, 305 U.S. 675, 83 L. Ed. 437; *Morehead vs. People of State of New York ex rel. Tipaldo, N.Y.*, 56 S. Ct. 918, 298 U.S. 587, 80 L. Ed. 1347, 103 A.L.R. 1445, rehearing denied 57 S. Ct. 4, 299 U.S. 619, 81 L. Ed. 456; *Hebert vs. State of Louisiana*, La., 47 S. Ct. 103, 272 U.S. 312, 71 L. Ed. 270, 48 A.L.R. 1102.

Appellees recognize that a state statute may be so construed as to render it repugnant to the Federal Constitution. However, that result is not presented in this case. Articles 4291 and 1853, relied on by Appellants, involve purely procedural matters in removing a guardianship proceeding from one Texas county to another. Appellants are attacking the validity of certain actions of the guardian for alleged non-

compliance with those statutes. The state courts have held that there is no proof of noncompliance with these statutes such as to render void the orders and proceedings of the probate court which were a matter of record for some forty-two years before the filing of these suits.

Neither is there any attack in these cases upon the validity of Article 5528, which proscribes the limitation period within which suit may be brought against the sureties on a guardian's bond. The effect of the state court decision is simply that the statute was inapplicable, but that under another limitation statute, Article 5529, Vernon's Civil Statutes of Texas, Appellants' alleged cause of action was barred long before these suits were filed.

THE STATE COURT DECISION IS CORRECT

This case involves nothing but Texas law and, insofar as it pertains to the matters complained of by Appellants, was properly decided. Insofar as the bonding companies are concerned, the cases also involve the proper application of Rule 166-A of the Texas Rules of Civil Procedure, pertaining to summary judgment.

Since the absence of any federal question is clearly demonstrated, it is thought that this Honorable Court will probably not be keenly interested in the merits of the decision of the state court from the standpoint of state law. However, in order that the Court might know the basis of that decision with regard to the bonding companies, there is copied in the Appendix

of this Brief that portion of the bonding companies' brief filed in the Supreme Court of Texas dealing with the merits of the controversy.

The only "question" presented by Appellants which affects any of the Appellees other than the bonding companies is number 8 concerning whether there has been a severance of the surface and mineral estates of the land in question. It is difficult to imagine a question more exclusively involving state law. This is apparent from the fact that in their discussion of the question Appellants cite only state court decisions.

If the Supreme Court of the United States has jurisdiction in this case, and chooses to exercise it, it is difficult to conceive of any kind of case which might be filed in the state courts, from the Justice Court on up, with which this highest court in the land might not be ultimately burdened. Appellees are inclined to think that there are cases demanding the attention of the Court with issues of greater public importance than whether Appellants were wronged forty-eight years ago when their father and guardian accepted a stallion and a mare named Ann in lieu of $400.00 cash.

CONCLUSION

Appellants' appeal (or petition for certiorari) hould be dismissed for want of jurisdiction; or, al-rnatively, same should be denied.

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CERTIFICATE OF SERVICE

I, G. D. Hinson, one of the attorneys for Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of May, 1961, I served copies of the foregoing brief on the following attorneys of record for Appellants:

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APPENDIX

Portion of Brief of American Bonding Company of Baltimore and American Surety Company of New York filed in the Supreme Court of Texas

FIRST COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners' alleged cause of action against Respondent American Surety Company of New York constitutes a collateral attack upon the order of the County Court of Young County, Texas, entered on the 15th day of July, 1915, releasing and discharging said Respondent as surety upon the guardian's bond.

SECOND COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners' alleged cause of action against Respondent American Bonding Company of Baltimore constitutes a collateral attack upon the order entered by the County Court of Bell County, Texas, on the 4th day of April, 1910, releasing and discharging said Respondent from further liability as surety on the guardian's bond.

THIRD COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners' alleged cause of action is barred by the four year statute of limitation, Article 5529.

FOURTH COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners have been guilty of laches.

STATEMENT

G. W. Birdwell, father of Petitioners, made application for letters of guardianship and was appointed guardian of the estates of Petitioners, who were then minors, in the County Court of Bell County, Texas, in 1906 (Tr. 8-10). In the order appointing him he was required to give bond in the sum of Three Thousand Dollars ($3,000) (Tr. 10), which he did on August 23, 1906, when he filed a guardian's bond with two personal sureties (Tr. 12). On September 22, 1909, G. W. Birdwell, as guardian, and American Bonding Company of Baltimore, as surety, executed a guardian's bond in the sum of Three Thousand Dollars ($3,000) which was approved by the County Court of Bell County on October 9, 1909 (Tr. 14).

On March 5, 1910, American Bonding Company of Baltimore made application to be discharged from liability for the future acts of the guardian (Tr. 23). On April 4, 1910, the County Court of Bell County granted such application and ordered the guardian to file a new bond (Tr. 24).

On August 10, 1913, after the guardianship had been transferred to Young County, the guardian filed a general guardian's bond in the sum of Twenty-Five Hundred Dollars ($2500) with the American Surety Company of New York, as surety, which was, on that

date, approved by the County Judge of Young County, Texas (S.F. 48). On February 25, 1915, Respondent American Surety Company of New York sent a petition to the County Clerk of Young County asking that it be released as surety on the guardian's bond (S.F. 52, 53). On July 13, 1915, the County Court of Young County entered an order granting petition of American Surety Company and discharging it from any further liability on said guardian's bond (S.F. 53, 54).

In their amended petition in Cause No. 18,486 (on appeal from Cause No. 436 in the County Court of Young County) Petitioners pray that the orders discharging Respondents from liability as sureties on the guardian's bonds be set aside, and that Respondents be held liable to Petitioners for alleged misappropriations by the guardian (Tr. 23, Second Part). The same relief is sought in Cause No. 13,313, filed as an original suit in the District Court of Young County (Tr. 35).

In both cases Respondents plead that Petitioners' alleged causes of action constitute collateral attacks upon the orders of the Probate Court discharging Respondents as sureties on the guardian's bonds, and Respondents also plead the four year statute of limitations, Article 5529, and laches (Tr. 72 and 77; Tr., Second Part, 60 and 94).

On June 4, 1959, District Court of Young County, Honorable Arthur Tipps presiding, held a pre-trial hearing in this cause with ". . . all parties agreeing in open court that all of the special exceptions, limitation pleas, and other dilatory matters, and all mo-

tions for summary judgment of defendants American Bonding Company of Baltimore and American Surety Company of New York on file herein should be presented and were presented to the court (Tr. 66). Pursuant to such hearing the court entered judgment sustaining the special exceptions, limitation pleas, motions for summary judgment of all of the defendants, including the Respondents, and ordered the Petitioners' alleged causes of action dismissed at Petitioners' cost (Tr. 66 and Tr. Second Part, 40).

ARGUMENT AND AUTHORITIES

Petitioners contend that under Article 5528 they had four years from the date of their father's death within which to file suit against these Respondents as sureties on their respective guardian's bonds. However, they completely overlooked the fact that orders were entered in 1910 and in 1915 discharging these sureties from liability under their respective bonds, and those orders, unless and until set aside by appropriate action brought for that purpose, bar any recovery by Petitioners.

The proper remedy by which to attack the orders is by bill of review. 25 *Tex. Jur.* 585, Judgments, Sec. 185. It is well settled that the four year statute of limitation, Article 5529, applies to bills of review. *Parmley vs. Parmley* (Civ. App. 1941) 149 S.W. 2d 647, err. ref.; *Morse vs. Morse* (Civ. App. 1942) 162 S.W. 2d 1023, err. ref. Each of those cases involves a bill of review to set aside certain guardianship proceedings. In each instance the court held that the four

year statute of limitation applied, and that it commenced to run when the wards attained the age of twenty-one (21) years or married prior to that date. In the instant case Petitioner Lee Birdwell Green attained the age of twenty-one (21) in 1918, and Petitioner William Birdwell attained the age of twenty-one (21) in 1924.

Petitioners allege, but do not prove, that the order discharging American Surety Company from further liability is erroneous because the guardian never filed a new bond. There is no proof in the record that a new bond was not filed as ordered, but even assuming that to be the case, the fact remains that the order entered by the County Court of Young County, Texas, on July 15, 1915, discharging American Surety Company from further liability is not void, even if voidable. If the order is voidable, then it may be set aside only by bill of review commenced prior to the running of the limitation statute. A case directly in point is *Miller vs. Miller* (Civ. App. 1899) 53 S.W. 362, err. ref., in which the court held:

> "The judgment of the probate court discharging the sureties on the guardian's bond being erroneous, the plaintiffs were entitled to have it corrected by bill of review . . ." (Page 364)

In the case of *Moore vs. Hanscom* (Sup. Ct. 1908) 106 S.W. 876 an order discharging a surety (American Surety Company) was under attack. The court held that such an order is not subject to collateral attack, and that the burden was upon the parties

attacking the order to show the lack of jurisdictional facts rendering the order void.

The Court of Civil Appeals held that the trial court propery granted these Respondents' motions for summary judgment inasmuch as Petitioners failed to counter such motions with any evidence sufficient to toll the four year statute of limitation, Article 5529. It was equally proper for the trial court to sustain Respondents' special exceptions based on the four year statute of limitation. In other words, Petitioners' pleadings show on their face that their cause of action, as against these Respondents, as sureties on their respective guardian's bonds, is barred by limitation. In that connection it is pointed out that these Respondents are not involved in the trespass to try title action, as to which the Court of Civil Appeals has held that Petitioners' pleadings do not show on their face that such action is barred by the various statutes of limitation. Without intending to comment one way or the other on such holding, these Respondents would direct the court's attention to the fact that in the trespass to try title action, the limitation statutes dealing with adverse possession are involved, while in the action against these Respondents an entirely different statute of limitation, Article 5529, is applicable.

Petitioners' pleadings of fraud, concealment and the like on the part of the guardian, their father, whether or not relevant for any other purpose, have no pertinence to the application of the four year statute of limitation. There was no concealment of the nature or extent of the property which came under the control

and possession of the guardian. All of that is a matter of record. If the guardian never accounted to Petitioners for any of such property, upon their attaining majority, then that fact must necessarily have been known to Petitioners. If, on the other hand, they contend that they were ignorant of that fact that they were entitled to receive any property from the guardian, then they are confronted with the obvious fact that this information could have been gained by examining the probate records of Bell and Young Counties. This is virtually admitted by Petitioners on page 45 of their brief where it is stated "that after an examination of the record by their attorney, and after an examination of the probate records of Bell County, Texas, the said attorney was enabled to discover the invalidity of the title, and immediately filed this suit in this cause of action, Tr. 31, and on the 25th day of February, 1955". If such information could be obtained from the records of Bell County in 1955, why was it not equally available for the previous thirty years, during all of which time both of Petitioners were of legal age.

More precisely, the question here involved is not whether the guardian's alleged defalcation of his wards' property and funds was concealed, but whether there was any fraudulent concealment of the orders of the probate courts of Bell and Young Counties discharging these Respondents as sureties on the respective guardian's bonds. Unless and until those orders are set aside, the question of the guardian's alleged misappropriations is not even reached. Since those orders have been a matter of record since 1910 and 1915, respectively, it is apparent that Petitioners' fail-

ure to take action to set them aside was occasioned, not by any fraud or concealment, but by Petitioners' utter lack of diligence.

Since Petitioners' pleadings show upon their face that their action to set aside the orders of the probate courts discharging these sureties is barred by limitation, the trial court properly sustained Respondents' special exceptions, as well as their motions for summary judgment, all of which were considered together by agreement of the parties (Tr. 66).

FIFTH COUNTERPOINT

(Restated)

The Trial Court correctly held that there was no liability on the part of Respondents, each of whom was surety on a general guardian's bond, for alleged misappropriation by the guardian of proceeds from the sale of real estate.

STATEMENT

The bond on which American Bonding Company of Baltimore is surety is a general guardian's bond, unrelated to the sale of real estate (S.F. 23). The same is true of the bond on which the American Surety Company of New York is surety (S.F. 47, 48). In the trial court Petitioners contended that the latter bond was a guardian's sale bond rather than a general bond, but such is clearly not the case. At that time there was in effect a statute (now Article 4201) which provided that the order of sale of real estate should require the guardian to file a good and sufficient bond

subject to the approval of the court in an amount equal to twice the amount for which the real estate is sold. The guardian filed an *application* for the sale of real estate in the County Court of Young County on August 27, 1913 (S.F. 47), eleven (11) days *after* the guardian's bond with American Surety Company as surety was filed and approved. An *order of sale* was not entered until October 13, 1914 (S.F. 49), almost two months after the bond was approved. The real estate in question was sold for Two Thousand Dollars ($2,000), which means that a guardian's sale bond would have had to be in at least the amount of Four Thousand Dolars ($4,000).

Petitioners' alleged cause of action against Respondents is based upon the alleged misappropriation by the guardian of the proceeds of sale of the real estate in Young County. In their answers and motions for summary judgment Respondents plead, in their defense, that, as sureties of the guardian's general bond, they were not liable for the alleged misappropriation of the proceeds of the real estate sale (Tr. 72, 77 and Tr., Second Part, 60 and 94). These contentions were sustained by the trial court.

ARGUMENT AND AUTHORITIES

It is well settled that, prior to the adoption of the new Texas Probate Code, the sale of real estate was not one of the general duties of a guardian, and that the sureties on his general bond are not liable for derelictions in respect to such sale. 21 *Tex. Jur.* 351, Guardian and Ward, Sec. 374. In *American Indemnity Company vs. Noble* (Com. App. 1921) 235

S.W. 867, the Commission of Appeals, in an opinion by the Supreme Court, held:

> ". . . The duty to sell being distinct from the general duties, the surety on the general bond only assumed the responsibility for the breach of the general duties by the guardian, and is not liable for his failure to give a special bond or to account for the proceeds of the sale of real estate." (Page 868, 869)

The case of *American Indemnity Company vs. Noble* has been cited and followed many times. *Jarnagin vs. Garrett* (Civ. App. 1954) 69 S.W. 2d 511, err. ref.; *American Indemnity Company vs. Padgett* (Civ. App. 1940) 136 S.W. 2d 254.

Since Respondents were only sureties on general bonds, they are not liable for the alleged misappropriations of the proceeds of the sale of real estate, even assuming that such occurred.

SIXTH COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners did not allege a cause of action against Respondents in that Petitioners' pleadings show, upon their face, that the alleged misapplication of funds, if any, by the guardian did not occur while the bonds upon which Respondents were sureties were in effect.

STATEMENT

Petitioners seek to recover from Respondents for alleged misappropriation of funds realized from the

sale of land belonging to the wards. Such sale was made and confirmed by the probate court on October 20, 1913 (S.F. 51).

As stated under previous statements, the American Bonding Company was discharged from further liability on its bond by order of the County Court of Bell County on February 8, 1910 (S.F. 38). American Surety Company was discharged from further liability on its bond by order of the County Court of Young County entered on the 13th day of July, 1915 (S.F. 53). Neither of such orders has ever been set aside.

ARGUMENT AND AUTHORITIES

If the guardian misappropriated any funds realized from the sale of real estate belonging to the wards, it must have occurred after October 20, 1913, when the guardian's sale was confirmed. Therefore, under no circumstances could there be any liability on the part of American Bonding Company, which was discharged from any further liability on April 4, 1910. Neither could there be any liability on the part of American Surety Company, even assuming that its bond was a sale bond rather than a general bond, unless the defalcations occurred prior to July 13, 1915, at which time an order was entered discharging said Respondent from further liability on its bond.

In their pleadings Petitioners do not allege, nor did they undertake to prove, that the alleged misappropriations occurred prior to July 13, 1915.

It is held that:

> "The liability on a bond commences with the assumption of duties by a guardian and the execution of the instrument by the sureties. It continues until exoneration of the principal, either by a discharge or by a valid release, or exoneration of the sureties by the giving of a new bond and the issuance of an order releasing them." 21 Tex. Jur. 352, Guardian and Ward, Sec. 375.

The burden was upon Petitioners to allege and prove that the alleged misappropriations occurred while the guardian's bonds were in effect and before the sureties were discharged from liability. Petitioners failed completely to discharge this burden.

SEVENTH COUNTERPOINT

(Restated)

The Trial Court correctly sustained Respondents' plea to the jurisdiction in Cause No. 13,468, on appeal from Cause No. 436 in the County Court of Young County, Texas.

STATEMENT

Cause No. 13,468 is on appeal from the original guardianship proceedings, being Probate Cause No. 436 in the County Court of Young County, Texas. Respondents filed their plea to the jurisdiction of the County Court based upon two grounds: (1) That Petitioners sought recovery against Respondents in excess of One Thousand Dollars ($1,000), and therefore in excess of the jurisdictional limit of the County

Court; and (2) That the case was filed and docketed as a probate matter, and since Petitioners' alleged cause of action was actually in the nature of a civil action, the County Court, sitting as probate court, was without jurisdiction (Tr. 60). Such plea to the jurisdiction was sustained by the County Court (Tr., Second Part, 92) and also by the District Court (Tr., Second Part, 92 and 40).

ARGUMENT AND AUTHORITIES

The jurisdiction of the County Court in civil matters is limited to cases wherein the matter in controversy is under One Thousand Dollars ($1,000), exclusive of interest. Article 1950. Since Petitioners seek judgment against Respondents in excess of that amount, the County Court was clearly without jurisdiction.

It is also well established that a suit against surety on a guardian's bond is in the nature of a civil action, and does not come within the jurisdiction of the probate court. 21 *Tex. Jur.* 357, Guardian and Ward, Sec. 378. In fact, former statutes which attempted to confer jurisdiction on the probate court to render judgment on the guardian's bonds were held unconstitutional, *Ibid; Timmins vs. Bonner and Long* (Sup. Ct. 1883) 58 Tex. 554.

Since this case is on appeal from the probate court, the jurisdiction of the District Court was limited to matters which were properly before the probate court. 21 *Tex. Jur.* 332, Guardian and Ward, Sec. 358.

Petitioners will perhaps contend that the action they

filed in the probate court was not a civil action on the guardian's bonds, but merely an action for a final accounting with the guardian. Obviously, such is not the case. When the guardian died the probate court lost control over the guardianship, which was thereby terminated. The guardianship having terminated, the probate court was without authority either to render a decree against the former guardian or to settle his account and dismiss his sureties. 21 *Tex. Jur.* 358, Guardian and Ward, See. 379; *American Bonding Company of Baltimore vs. Logan* (Civ. App. 1910) 132 S.W. 2d 894.

The courts below properly held that in probate matter No. 436 in the County Court of Young County, appealed to the District Court in Cause No. 13,468, said courts were without jurisdiction to enter judgment against Respondents as sureties on the guardian's bond or to have an accounting between Petitioners and their guardian, who died prior to the time this action was instituted.

EIGHTH COUNTERPOINT

(Restated)

The Trial Court correctly held that the guardian was authorized, by proper order of the probate court, to use the guardianship funds for the education, support and maintenance of Petitioners during their minority.

STATEMENT

Letters of guardianship were granted to G. W. Birdwell in 1906 in the County of Bell County (S.F. 8)

The inventory and appraisement filed by the guardian and approved by the court shows the wards to own an undivided 1/5 interest in some land, the appraised value of their interest being Thirteen Hundred Seventy-five Dollars ($1,375), and an undivided 1/5 interest in some personal property, the appraised value of their interest being Eighty-Five Dollars ($85) (S.F. 10, 11). Soon after his appointment the guardian, in October, 1906, made application to sell the real estate, alleging that it was necessary for the education and maintenance of the wards (S.F. 14). Apparently, no action was taken on the original application, so the guardian again made application to sell the real estate in 1909, again alleging that it was necessary to sell the same for their education and maintenance, and "That your petitioner is the sole surviving parent of said minors, and through financial losses and ill health is unable to properly maintain and educate the said minors without using a portion of the estate of said minors for that purpose" (S.F. 19). The County Court of Bell County found that it was necessary to sell the land for the support and maintenance of said minors (S.F. 29, 30). The real estate was sold for Fifteen Hundred Fifty Dollars ($1,550), of which Four Hundred Dollars ($400) was paid in cash (S.F. 34). Immediately thereafter the guardian made application for an allowance stating that the minors had no assets except the proceeds of the land which was sold, and that the guardian was not financially able to support, educate and maintain said minors (S.F. 35). Such application was granted and the guardian was granted an allowance of One Hundred Dollars ($100) per year

for each of said minors for their education, support and maintenance, such order being entered the 10th day of January, 1910, (S.F. 36).

ARGUMENT AND AUTHORITIES

The record conclusively shows Petitioners' father, as guardian, not only had authority to use the funds which came into his hands as guardian, but that it was necessary for him to do so in order to support and maintain Petitioners during their minority. The record shows that Petitioners' father was in ill health and not financially able to support Petitioners without invading the assets of the guardianship. This he did with full approval by and under order of the probate court. Therefore, aside from the other defenses available to Respondents, it appears conclusively from the records that, *on the merits*, Petitioners could not prevail against Respondents.

The application for guardianship shows that Lee Birdwell Green was nine (9) years of age and William Birdwell was three (3) years of age in 1906. Therefore, when the allowance of One Hundred Dollars ($100) per year per ward was entered in 1910 the Wards were thirteen (13) and seven (7) years of age respectively. It is obvious, therefore, that by the time both wards attained majority, or married, the guardian was authorized by order of the court to use far more than the Fifteen Hundred Dollars ($1,500) realized from the sale of real estate.

If Petitioners realy thought that their father defrauded them, why did they wait more than thirty

(30) years after they attained majority, and after their father died, before filing these suits? Obviously, it was their purpose to wait until death sealed his lips. The records still speak, however, and they show that Petitioners' father, in the face of ill health and financial woes, struggled to provide for them, as any father should. Rather than a defrauder, he was their benefactor.

PRAYER

WHEREFORE, these Respondents pray that the judgment of the Trial Court be in all things affirmed.

Respectively submitted,

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